No. 6590

United States

Circuit Court of Appeals

For the Ninth Circuit.

SPOKANE, PORTLAND AND SEATTLE RAILWAY, COMPANY, a Corporation,

Appellant,

vs.

CHARLES A. COLE,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

FILED
SEP 23 1931
PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. CHARLES A. HART, Mr. FLETCHER ROCKWOOD, CAREY, HART, SPENCER and McCULLOCH, Yeon Building, Portland, Oregon,

For the Appellant.

DAVIS & HARRIS, 507 Failing Building, Portland, Oregon,

For the Appellee.

In the District Court of the United States for the District of Oregon.

No. L.–10,827.

CHARLES A. COLE,

Plaintiff,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Corporation,

Defendant.

CITATION ON APPEAL.

To Charles A. Cole, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a notice of appeal filed in the Clerk's office of the District Court of the United

States for the District of Oregon, wherein Spokane, Portland and Seattle Railway Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment in said cause should not be corrected and speedy justice *should be* done to the parties in that behalf.

Given under my hand at Portland, in said District, this 3d day of August, 1931.

JOHN H. McNARY,
Judge. [1*]

District of Oregon,
County of Multnomah,—ss.

Due service of the within citation on appeal is hereby accepted in Multnomah County, Oregon, this 4th day of August, 1931, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for defendant.

DAVIS & HARRIS,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 4, 1931. [2]

In the District Court of the United States for the District of Oregon.

July Term, 1929.

BE IT REMEMBERED, that on the 23d day of October, 1929, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit: [3]

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Oregon.

L.–10,827.

CHARLES A. COLE,

Plaintiff,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff, and for cause of action against said defendant complains and alleges as follows:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Washington and has duly complied with the laws of the State of Oregon entitling it to do business therein, and is engaged in the business of operating a railway system, a portion of which extends in a general easterly and westerly direction through portions of Skamania County, Washington.

II.

That plaintiff is a resident and inhabitant of the State of Oregon.

III.

That the plaintiff is the surviving father of Leona J. Cole, who at the time she met her death, as here-

inafter set forth, was a minor of the age of eighteen years. [4]

IV.

That at all times hereinafter alleged there was in full force and effect, in the State of Washington, the following statute enacted by the Legislature of said State, the same being known as Section 184, Remington's Code, which said section is as follows:

> "A father or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward."

V.

That at all times hereinafter alleged there was in full force and effect in the State of Washington the following statute enacted by the Legislature of said State, the same being Chapter 72 of the Session Laws of 1923 of the State of Washington, and entitled "An act relating to the age of majority and amending sections 1572 and 10548 of Remington's Compiled Statutes," which said chapter reads as follows:

> "Section 1. That Section 1572 of Reming ton's Compiled Statutes be amended to read as follows:
>
> Section 1572. Guardians herein provided for shall at all times be under the general direction and control of the court making the appointment. For the purposes of this act, all persons shall be of full and legal age when they shall be twenty-one years old, and females shall

be deemed of full and legal age at any age under twenty-one years when with the consent of the parent or guardian, or the person under whose care or government they may be they shall have been legally married.

Section 2. That Section 10548 of Remington's Compiled Statutes be amended to read as follows:

Section 10548. All persons shall be deemed and taken to be of full age for all purposes at the age of twenty-one years and upwards."

VI.

That approximately a half mile west of the City of Underwood in Skamania County, Washington, a road and thoroughfare leading to a Government Fish Hatchery and extending in a general [5] northerly and southerly direction, crosses the defendant's right of way.

VII.

That on or about the 30th day of August, 1928, the plaintiff's minor intestate was riding as a passenger in an automobile being operated in a northerly direction on said road and thoroughfare, when the same was violently run into and struck by a train being operated by the defendant in a westerly direction, and as a result thereof said intestate received injuries which resulted in her death.

VIII.

Plaintiff alleges that the defendant was then and there careless and negligent in the following particulars, to wit:

(a) That the said defendant carelessly and negligently operated said train, in view of the character of the crossing and the conditions existing at the place of said collision, and in view of the fact that defendant failed to sound any warning or alarm of its approach, at a high, dangerous and reckless rate of speed, to wit: over forty miles per hour.

(b) That said defendant carelessly and negligently failed to sound any warning or alarm in approaching said intersection to warn and advise travelers at said point;

(c) That the said defendant carelessly and negligently maintained its right of way at and near said crossing in a dangerous condition, in that the defendant permitted unneccessary obstructions upon its right of way at or near said crossing so as to obstruct the view thereat, both of its servants approaching said crossing on a train and of persons upon said highway, in that the defendant allowed said right of way to become overgrown with bushes, weeds and grass so as to obstruct said view. [6]

IX.

That at the time said minor intestate met her death, as heretofore alleged, she was an intelligent, industrious and healthy girl of the age of eighteen years and in full possession of her faculties, was unmarried, and was the daughter of the plaintiff, and immediately prior to the time of her death was and had been living with and in the service and employment of this plaintiff, who was, and during her minority had she lived would have been, entitled to her earnings and the value of her services and earn-

ings over and above the cost of providing her with the usual and customary necessities of life, which is and would have been of the value of Ten Thousand ($10,000.00) Dollars, in which said sum plaintiff has been damaged.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Ten Thousand ($10,000.00) Dollars and for his costs and disbursements incurred herein.

DAVIS & HARRIS,
Attorneys for Plaintiff. [7]

State of Oregon,
County of Multnomah,—ss.

I, Charles A. Cole, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; and that the foregoing complaint is true as I verily believe.

CHARLES A. COLE,

Subscribed and sworn to before me this 22d day of October, 1929.

[Seal] F. C. HILLER,
Notary Public for the State of Oregon,
My commission expires Jan. 21, 1931.

Filed October 23, 1929. [8]

AND AFTERWARDS, to wit, on the 29th day of October, 1929, there was duly filed in said court an answer, in words and figures as follows, to wit: [9]

[Title of Court and Cause.]

ANSWER.

Defendant for answer to the complaint of the plaintiff in the above-entitled case alleges:

I.

Admits the allegations of Paragraph I of the complaint.

II.

Admits the allegations of Paragraph II of the complaint.

III.

Admits the allegations of Paragraph III of the complaint.

IV.

Admits the allegations of Paragraph IV of the complaint.

V.

Admits the allegations of Paragraph V of the complaint. [10]

VI.

Admits the allegations of Paragraph VI of the complaint.

VII.

Admits that on or about August 30, 1928, the said deceased daughter of plaintiff was riding as a passenger in an automobile being operated in a northerly direction on a road and that at said time there was a collision between said automobile and a car being operated by the defendant on its track in a westerly direction, and that as a result thereof said deceased daughter received injuries which resulted

in her death as alleged in Paragraph VII, but except as so admitted defendant denies the allegations of Paragraph VII of the complaint.

VIII.

Denies the allegations of Paragraph VIII of the complaint.

IX.

Defendant has no information relating to the facts alleged in Paragraph IX of of the complaint and for this reason denies said allegations.

For a further and separate answer defendant alleges:

X.

That the plaintiff's daughter Leona J. Cole was contributorily negligent and that said contributory negligence was a proximate cause of the injuries to and the resulting death of said Leona J. Cole, and that said contributory negligence of the said Leona J. Cole consisted of failure to exercise proper or any precautions, in approaching said crossing as a passenger in said automobile, to observe the approach of trains upon said [11] railroad track or to warn the driver of said automobile of the approach of said car of the defendant which struck said automobile.

WHEREFORE, defendant demands that plaintiff take nothing by this action and that defendant have its costs and disbursements herein.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY & KERR,
Attorneys for Defendant [12]

State of Oregon,
County of Multnomah,—ss.

I, Robert Crosbie, being first duly sworn, on oath depose and say: That I am the Secretary of Spokane, Portland and Seattle Railway Company, a corporation, defendant in the above-entitled action, that I have read the foregoing answer, know the contents thereof, and that the same is true as I verily believe.

ROBERT CROSBIE.

Subscribed and sworn to before me this 28th day of October, 1929.

[Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires August 28, 1931.

District of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 29th day of October, 1929, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for defendant.

DAVIS & HARRIS,
Attorneys for Plaintiff.

Filed October 29, 1929. [13]

AND AFTERWARDS, to wit, on the 2d day of November, 1929, there was duly filed in said court, a reply, in words and figures as follows, to wit: [14]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff and, in reply to the defendant's answer, admits, denies and alleges, as follows:

I.

Denies each and every allegation, matter and thing contained in said answer, except as heretofore either expressly admitted, stated, qualified or explained in plaintiff's complaint.

Replying to defendant's further and separate answer plaintiff admits, denies and alleges:

I.

Denies each and every allegation, matter and thing contained in said further and separate enswer, except as heretofore either expressly admitted, stated, qualified or explained in plaintiff's complaint.

WHEREFORE, plaintiff demands judgment as prayed for in his complaint.

DAVIS & HARRIS,
Attorneys for Plaintiff. [15]

State of Oregon,
County of Multnomah,—ss.

I, Charles A. Cole, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; and that the foregoing reply is true as I verily believe.

CHARLES A. COLE.

Subscribed and sworn to before me this 29th day of October, 1929.

[Seal] F. C. HILLER,
Notary Public for the State of Oregon.

My commission expires Jan. 21, 1931.

Due service by copy admitted at Portland, Oregon, this 1st day of Nov., 1929.

FLETCHER ROCKWOOD,
Attorneys for Defendant.

Filed November 2, 1929. [16]

AND AFTERWARDS, to wit, on Wednesday, the 25th day of February, 1931, the same being the 78th judicial day of the regular November term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, Presiding—the following proceedings were had in said cause, to wit: [17]

[Title of Cause.]

MINUTES OF COURT—FEBRUARY 25, 1931—VERDICT.

Now *at* this day comes the plaintiff by Mr. Paul R. Harris and Mr. Donald K. Grant, of counsel, and the defendant by Mr. Fletcher Rockwood, of counsel. Whereupon the jurors impaneled herein being present and answering to their names, the further trial of this cause at the same time and before the same jury as the cause of Charles A. Cole vs. Spokane, Portland & Seattle Railway Company, No.

L.–10,826, pursuant to the oral stipulation of the parties hereto made and entered in open court herein, is resumed. And the said jury having heard the evidence adduced, the arguments of counsel, and the instructions of the court, retires in charge of proper sworn officers, to consider of its verdict. And thereafter said jury comes into court and returns its verdict in words and figures as follows, to wit:

> "We, the Jury, duly empaneled and sworn, in the above-entitled cause, find our verdict in favor of the plaintiff and against the defendant and assess plaintiff's damages at Two Thousand ($2000.00) Dollars.
>
> E. A. ROSS,
> Foreman."

(Leona J. Cole)
(18 years of age)

which verdict is received by the court and ordered to be filed. Whereupon upon motion of plaintiff,—

IT IS ADJUDGED that plaintiff do have and recover of and from said defendant the sum of $2,000.00, together with his costs and disbursements herein taxed at $20.00, and that execution issue therefor. [18]

AND AFTERWARDS, to wit, on the 25th day of February, 1931, there was duly filed in said court a verdict, in words and figures as follows, to wit: [19]

[Title of Court and Cause.]

VERDICT.

We, the jury, duly empaneled and sworn, in the above-entitled cause, find our verdict in favor of the plaintiff and against the defendant and assess plaintiff's damages at Two Thousand ($2,000.00) Dollars.

E. A. ROSS,
Foreman.

(Leona J. Cole)
(18 years of age)

Filed February 25, 1931. [20]

AND AFTERWARDS, to wit, on the 2d day of March, 1931, there was duly filed in said court a motion for new trial and in arrest of judgment, in words and figures as follows, to wit: [21]

In the District Court of the United States for the District of Oregon.

No. L.–10,826.

CHARLES A. COLE,

Plaintiff,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Corporation,

Defendant.

No. L.–10,827.

CHARLES A. COLE,

Plaintiff,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Corporation,

Defendant.

MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT.

The defendant, Spokane, Portland and Seattle Railway Company, respectfully moves the court for a new trial in the above-entitled cases and in arrest of judgment upon the grounds that—

1. The damages awarded by the verdicts of the jury in each case are excessive and appear to have been given under the influence of passion and prejudice.

2. The court erred as a matter of law in declining to give defendant's requested instruction number IV reading as follows:

> "I instruct you that the evidence is insufficient to show any negligence on the part of the defendant in [22] the manner in which the crossing itself was maintained with respect to the view at the crossing of train operators along the highway and of automobile operators along the railroad. Consequently all allegations of negligence with respect to obstruction of view and the maintenance of the crossing itself are

withdrawn from your consideration and you cannot base any recovery on any such allegations."

The foregoing motion is made upon the pleadings and files in this case, the proceedings in the trial including the minutes of the court, for the causes above specified, which are causes set forth in Section 2–802, Oregon Code, Annotated, 1930, being the same as Section 174, Oregon Laws, and in accordance with the rules of this court.

Dated March 2, 1931.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CARY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this 2d day of March, 1931, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for defendant.

DAVIS & HARRIS,
Attorneys for Plaintiff.

Filed March 2, 1931. [23]

AND AFTERWARDS, to wit, on Monday, the 18th day of May, 1931, the same being the 60th judicial day of the regular March term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, Presiding—the following proceedings were had in said cause, to wit: [24]

[Title of Cause.]

MINUTES OF COURT—MAY 18, 1931—ORDER DENYING MOTION FOR NEW TRIAL.

This cause was heard by the Court upon the motion of the defendant for a new trial herein, and was argued by Mr. Paul R. Harris and Mr. Donald K. Grant, of counsel for plaintiff and by Mr. Fletcher Rockwood, of counsel for defendant. Upon consideration whereof,—

IT IS ORDERED that the said motion be and the same is hereby denied. [25]

AND AFTERWARDS, to wit, on Monday, the 8th day of June, 1931, the same being the 77th judicial day of the regular March term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, Presiding—the following proceedings were had in said cause, to wit: [26]

[Title of Court and Cause.]

MINUTES OF COURT—MAY 8, 1931—ORDER EXTENDING TIME TO AND INCLUDING JULY 15, 1931, TO FILE BILL OF EXCEPTIONS.

Upon application of the defendant, and for good cause shown, it is hereby

ORDERED that the time within which defendant may file and present its bill of exceptions herein is hereby extended to and including the 15th day of July, 1931.

Dated June 8, 1931.

JOHN H. McNARY,
Judge.

Filed June 8, 1931. [27]

AND AFTERWARDS, to wit, on the 29th day of July, 1931, there was duly filed in said court, a bill of exceptions in words and figures as follows, to wit: [28]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

This cause came on for hearing before the Honorable John H. McNary and a jury, on the 19th day of February, 1931, Messrs. Davis and Harris appearing as attorneys for the plaintiff, and Messrs. Carey, Hart, Spencer and McCulloch, and Mr.

Fletcher Rockwood, appearing as attorneys for the defendant.

By stipulation of the parties, and on order of the court this case was consolidated for trial with the case of Charles A. Cole, Plaintiff, vs. Spokane, Portland and Seattle Railway Company, a Corporation, Defendant, No. L.–10,826. This case, No. L.–10,827, arose out of the death of Leona J. Cole, a minor daughter of the plaintiff, and No. L.–10,826 arose out of the death in the same accident of Jacqueline A. Cole, another minor daughter of the same plaintiff.

After hearing all of the evidence, the argument of counsel and the charge of the court, the jury retired to consider the evidence and thereafter returned a verdict in favor of the plaintiff, in this case, assessing his damages at $2,000.00, upon which verdict judgment was thereafter on [29] the 25th day of February, 1931, entered by the court against the defendant.

Thereafter, on the 2d day of March, 1931, the defendant served and filed its motion for a new trial and in arrest of judgment, upon the grounds that the damages awarded by the verdict of the jury were excessive and appeared to have been given under the influence of passion and prejudice, and that the trial court erred as a matter of law in declining to give defendant's requested instruction number IV, which is quoted in full hereinafter in this bill of exceptions.

Thereafter, on the 20th day of April, 1931, the defendant's motion for a new trial and in arrest

of judgment was argued orally to the court by counsel for both parties, and on the 18th day of May, 1931, the court made its order denying the said motion.

I.

At the trial the defendant requested the court to instruct the jury as follows:

"IV.

I instruct you that the evidence is insufficient to show any negligence on the part of the defendant in the manner in which the crossing itself was maintained with respect to the view at the crossing of train operators along the highway and of automobile operators along the railroad. Consequently all allegations of negligence with respect to obstruction of view and the maintenance of the crossing itself are withdrawn from your consideration and you cannot base any recovery on any such allegations."

The court declined to give the requested instruction, and to the refusal of the court so to instruct the jury the [30] defendant duly excepted.

The evidence necessary to present clearly the questions of law involved in the ruling is as follows:

On the 30th day of August, 1928, Leona J. Cole, the daughter of the plaintiff, was killed in a collission between a gasoline propelled car operated by the defendant on its railroad, and a Ford touring automobile in which the decedent was a passenger, at a place approximately one-half mile west of the defendant's station at Underwood, Washington, where

a roadway from the grounds of the United States Government fish hatchery leading to a county road crosses the railroad track and right of way of the defendant. The hatchery grounds are located on the southerly side of the defendant's right of way and the county road lies parallel to the right of way on the northerly side.

The crossing at which the accident occurred is a private crossing. Witness Ray W. Hoffman, the Government employee in charge of the hatchery, a witness for the plaintiff, testified:

"Q. You, yourself, built this road, you said?

A. It was partially built when I came. I completed it.

Q. That was about three years ago?

A. Yes.

Q. And the purpose of the road was to furnish a means of getting to and from the fish hatchery? A. Yes.

Q. It is a private road, is it not?

A. I believe it is classed that way. [31]

Q. Well, you do know, do you not, that the crossing was built pursuant to a permit which was given by the railway company to the Bureau of Fisheries? A. Yes, sir.

Q. That is correct, is it not? A. Yes, sir.

* * * * * * * *

The road ends right at the fish hatchery, does it? A. Yes, sir.

Q. It opens up in your yard, so to speak, at the fish hatchery building?

A. It does." (T. pp. 83, 84.)

Witness Hoffman further testified that he built the road from the hatchery grounds up to the railroad track, but that the railroad constructed the actual crossing, and has since maintained it. (T. pp. 79, 80.)

With respect to the use of the road the same witness testified:

"Q. Well, now, that road has been occupied there how long? Been used, I mean.

A. In the neighborhood of* three years.

(*The evidence of this witness at the trial was taken, by stipulation, by reading into the record his testimony at the trial of the case of Cecile S. Cole vs. Spokane, Portland and Seattle Railway Company, which was tried in this court in October, 1929.)

Q. Now, what would you say as to the number of people going up and down there?

A. Well, it depends on the season of the year. During the fishing season I would say there is about twenty cars a day cross over the crossing. [32]

Q. What class of people come in there? Just explain that.

A. It is ranchers, fishing men, movie men—practically all classes of people.

Q. When you say 'movie' men, what do you mean?

A. Cameramen coming in to take pictures of the fish.

Q. Well, what would you say as to whether or not tourists and others coming there to look over the hatchery come in?

A. Yes, sir, they visit it often.

Q. This was in August. What would you say as to whether or not there were people coming in there frequently during that month?

A. Not so much right at that time of the year. Perhaps it would average two or three cars a day. That is outside cars.

COURT.—Outside cars?

A. Yes.

COURT.—There would be local cars, would there, that would use this road?

A. Speaking of outside cars, I mean the residents around Underwood there coming in; people that were not living at the hatchery.

Q. What would you say as to people that lived in there and worked there?

A. We crossed, probably, I would say, two or three trips a day out each car.

Q. And how many cars were there there?

A. There were three at the time." (T. pp. 80, 81.)

Mrs. Larson, a sister of Cecile S. Cole, the decedent's mother, was living at the hatchery grounds. Mr. Larson was then employed at the hatchery. (T. p. 33.) Just prior to the accident the decedent, with her mother, and her sisters and a brother had been visiting at the Larson home at the hatchery grounds. (T. p. 34.) Mrs. Larson with Mrs. Cole and their children were leaving the Larson home at the time [33] of the accident to drive to the place where the Coles were then living at a point to the north of the railroad. (T. pp. 47–49.) Mrs.

Larson was driving the automobile and the decedent was a passenger in the back seat of the automobile at the time of the accident. (T. pp. 60, 62, 64, 65.)

Various witnesses gave testimony as to the state of the vegetation along the railroad right of way between the location of the crossing and the direction from which the railroad car approached.

Witness Hoffman for the plaintiff testified on this subject on direct examination as follows:

"Q. Now, at the time these women were hurt, will you tell this jury what was the condition of the brush and foliage at that point?

A. Along the edge here there was brush growing—well there was one that was cut down, that was at least six feet high; a maple I would judge that it was. And there was brush all along the edge of the cut, that hid the view.

COURT.—Was the brush on the right of way of the railroad?

A. Yes, sir.

Q. And when was that brush cut down?

A. The next morning after the accident.

Q. Who cut that down?

A. The section crew.

Q. Now, what would you say was the extent of the brush along on that point as to whether it was heavy, or not?

A. Well, in places it grew in bunches. In places it was quite heavy, and then there would not be any for a ways, and then there would be another bunch. [34]

Q. How high would you say that brush grew?

A. The tallest was about six feet, around six feet.

Q. And the cut was about how deep, did you say?

A. In the neighborhood of eight or ten feet.

Q. That is, down to the bed of the railroad track? A. Yes.

Q. Well, at the time that brush was there, and the time these women were injured—you remember that very distinctly?

A. I certainly do.

Q. Well, now, what would you say then, as to whether or not that would obstruct the view a good deal worse than it did after they cut the brush down? A. Yes, it would.

Q. Would you estimate, then, about how near they would get to the track before they could see a train?

Well, that would be a rather hard question to answer, Mr. Davis; probably around one hundred feet.

Q. Well, how far now—when you were back how far would you have to be from the track?

A. To see one hundred feet?

Q. Yes.

A. The driver, I imagine, would be about seventeen feet from the rail.

Q. And then the front of the car would be still nearer. Is that the way you estimate it?

A. Yes.

COURT.—You mean the driver would have to be seventeen feet?

A. Yes.

COURT.—Not the car?

A. Not the car, but the driver."

Mrs. Cole, the decedent's mother, who was a [35] passenger in the front seat of the automobile, testified that the automobile stopped to allow her nephew, Elmer, to alight from the running-board of the automobile, where he had been riding. At that moment, she testified, the front end of the automobile was ten to twelve feet from the railroad track. (T. pp. 50, 57, 58.) She testified further as follows:

"Q. There is one thing I neglected to ask you. At the time you stopped, when you were travelling up that road, about what distance would you say you could see towards Underwood, in that cut?

A. Well, I don't think you could see more than 150 feet, if you could see that far.

Q. What was there there to prevent your vision, to prevent you from seeing?

A. There was quite a bit of brush on the cut there, which hung down. I don't know—there were trees, little trees, young willows, and there was quite a heavy brush there at the time.

Q. When you say hanging down, what do you mean?

A. They were leaning down towards the track from the top, leaning over like."

II.

The court denied the motion of the defendant for a new trial and in arrest of judgment, made on the ground, among others, that the damages awarded

by the verdict of the jury were excessive and appeared to have been given under the influence of passion and prejudice. The evidence necessary to present clearly the question of law involved in the ruling is as follows:

Leona J. Cole, the decedent, was 18 years of age at the time of her death. She would have become 19 years of age on the 16th of October, 1928. (T. p. 36.) The [36] accident occurred on August 30, 1928, so that at the date of her death she was 18 years 10½ months old.

Witness Lewis testified that she was "very intelligent, very pleasant" and "very industrious." (T. p. 26.)

She had always been in good health. (T. p. 37.) She finished grammar school at the age of twelve years, and attended the high school for three and one-half years. (T. p. 37.) She had done housework for a family named Nash. (T. p. 38.) She had worked in fall seasons packing apples at Underwood for which she was paid $3.50 per day (T. p. 56) during a season from in August to December 1st (T. p. 32), and just a few days prior to her death she had gone to Underwood for such work during the coming fall season. (T. p. 32.)

She had been employed by a Mrs. Simmons who testified as follows:

> "A. Well, she worked off and on, different times and then she worked for me about six months.
>
> Q. What kind of work did she do for you?
>
> A. Well, just general housework and taking care of the children.

Q. Well, now, what would you say about her as to being industrious and efficient in her work?

A. She did her work very well.

Q. And she worked for you six months at one time, and then worked for you off and on, did she? A. Yes.

Q. Well, what did you pay her for her services?

A. I paid her ten dollars a week." (T. p. 28.)

She assisted with the work at home, doing housework [37] and assisting in the care of the younger children. (T. p. 56.)

Whatever earnings she received from outside sources she turned over to her parents for use as a part of the family income in the support of the household. (T. p. 41, 56.) Her living expenses were then paid by her parents. (T. p. 41, 56.) Her clothes were not expensive because her mother made over for the children clothes given to her. (T. p. 38, 56.) As testified by her mother, "Usually all we had to buy was their shoes and stocking—something like that. Once in a while I would get them something new. And we lived very plain." (T. p. 56.)

Defendant tenders herein this its bill of exceptions to the action of the Court in refusing to give the requested instruction and in denying defendant's motion for a new trial, as herein noted.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant. [38]

[Title of Court and Cause.]

ORDER ALLOWING BILL OF EXCEPTIONS.

The defendant on July 13, 1931, and within the time allowed by the rules and orders of this court, delivered to the Clerk its bill of exceptions, and served a copy thereof on the attorneys for the plaintiff, and the court, having found that defendant's bill of exceptions is a true and correct statement of the facts therein referred to,—

NOW, THEREFORE, IT IS HEREBY ORDERED that the bill of exceptions presented by the defendant above referred to shall be allowed as the bill of exceptions in this case, and should be filed with the records in this case in the office of the Clerk of this court.

Dated July 29, 1931.

(Sgd.) JOHN H. McNARY,
Judge.

Approved.

DAVIS & HARRIS,
Attorneys for Plaintiff.

Lodged in Clerk's Office July 13, 1931. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. Filed July 29, 1931. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [39]

AND AFTERWARDS, to wit, on the 3d day of August, 1931, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [40]

[Title of Court and Cause.]

PETITION FOR APPEAL AND SUPERSEDEAS.

To The Honorable JOHN H. McNARY, District Judge, and One of the Judges of the Above-named Court:

Spokane, Portland and Seattle Railway Company, the defendant in the above-entitled case, considering iteself aggrieved by the judgment entered herein on the 25th day of February, 1931, in favor of the plaintiff and against the defendant in the sum of Two Thousand Dollars ($2,000.00), hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and the whole thereof, for the reasons set forth in the assignment of errors which is served and filed herewith, and said defendant prays that this petition for said appeal may be allowed, and that a transcript of the record and of all proceedings upon which said judgment is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and defendant further prays that an order be made fixing the amount of security which the defendant shall give and furnish upon the allowance of said appeal, and that upon the giving of such security, all further proceedings in [41] this court shall be suspended and stayed until the determination of said appeal by the United

States Circuit Court of Appeals for the Ninth Circuit.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER and McCULLOCH,
Attorneys for Defendant.

District of Oregon,
County of Multnomah, —ss.

Due service of the within petition for appeal is hereby accepted in Multnomah County, Oregon, this 3d day of August, 1931, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood, of attorneys for defendant.

DAVIS & HARRIS,
Attorneys for Plaintiff.

Filed August 3, 1931. [42]

AND AFTERWARDS, to wit, on the 3d day of August, 1931, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [43]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the defendant and files the following assignment of errors upon which it will rely upon the prosecution of its appeal in the above-entitled cause from the judgment entered herein in favor

of the plaintiff and against the defendant on the 25th day of February, 1931.

I.

The United States District Court in and for the District of Oregon erred in declining to give to the jury defendant's requested instruction Number IV, reading as follows:

"IV.

I instruct you that the evidence is insufficient to show any negligence on the part of the defendant in the manner in which the crossing itself was maintained with respect to the view at the crossing of train operators along the highway and of automobile operators along the railroad. Consequently all allegations of negligence with respect to obstruction of view and the maintenance of the crossing itself are withdrawn from your consideration and you cannot base any recovery on any such allegations." [44]

II.

The United States District Court in and for the District of Oregon, erred in denying defendant's motion for a new trial made upon the ground, among others, that the damages awarded by the verdict of the jury were excessive and appeared to have been given under the influence of passion and prejudice.

WHEREFORE, defendant prays that said judgment heretofore and on the 25th day of February, 1931, entered in this action against the de-

fendant and in favor of the plaintiff, be reversed, and that said cause be remanded to the United States District Court in and for the District of Oregon, for a new trial.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within assignment of errors is hereby accepted in Multnomah County, Oregon, this 3d day of August, 1931, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for defendant.

DAVIS & HARRIS,
Attorneys for Plaintiff.

Filed August 3, 1931. [45]

AND AFTERWARDS, to wit, on Monday, the 3d day of August, 1931, the same being the 24th judicial day of the regular July term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, Presiding—the following proceedings were had in said cause, to wit: [46]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The above-named defendant, Spokane, Portland and Seattle Railway Company, having duly served and filed herein its petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment entered herein in favor of the plaintiff and against the defendant on February 25, 1931, and having duly served and filed its assignment of errors upon which it will rely upon said appeal,—

IT IS ORDERED that the appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment entered in this action in favor of the plaintiff and against the defendant on February 25, 1931.

IT IS FURTHER ORDERED that the bond on appeal herein has been fixed at the sum of $2,000.00, the same to act as a supersedeas bond and is a bond for costs and damages on appeal.

Dated August 3, 1931.

JOHN H. McNARY,
District Judge.

Filed August 3, 1931. [47]

AND AFTERWARDS, to wit, on the 3d day of August, 1931, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [48]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Spokane, Portland and Seattle Railway Company a corporation, as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the state of New York, having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the Act of Congress of August 12, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety therein," as surety, are held and firmly bound unto Charles A. Cole in the full and just sum of $2,500.00 to be paid to said Charles A. Cole, his executors, administrators or assigns, to which payment well and truly to be made, the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents. Upon condition nevertheless that

WHEREAS the above-named Spokane, Portland and Seattle Railway Company has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment in favor of the above-named plaintiff, Charles A. Cole, made and entered on the 25th day of February, 1931, in the above-entitled action [49] by the District Court of the United States for the District of Oregon, praying that said judgment be reversed.

NOW, THEREFORE, the condition of this obligation is such that if the above-named appellant shall prosecute its appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF said principal and surety have executed this bond this 30th day of July, 1931.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY.
By CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER and McCULLOCH,
Its Attorneys.

AMERICAN SURETY COMPANY, OF NEW YORK.
By W. A. KING,
Resident Vice-president.
Attest: N. CODY,
Resident Assistant Secretary.

[Seal American Surety Company]

The foregoing bond is hereby approved as to form, amount and sufficiency of surety.

Dated August 3, 1931.

JOHN H. McNARY,
Judge of the United States District Court, for the District of Oregon.

District of Oregon,
County of Multnomah,—ss.

Due service of the within undertaking on appeal is hereby accepted in Multnomah County, Oregon, this 3d day of August, 1931, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for defendant.

DAVIS & HARRIS,
Attorneys for Plaintiff.

Filed August 3, 1931. [50]

AND AFTERWARDS, to wit, on the 3d day of August, 1931, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: [51]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To G. H. Marsh, Clerk of the Above-entitled Court:

You will please make up the transcript on appeal in the above-entitled case to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, and you will please include in such transcript on appeal the following, and no other, papers and exhibits, to wit:

1. Complaint.
2. Answer.
3. Reply.

4. Verdict.
5. Judgment.
6. Motion for a new trial and in arrest of judgment.
7. Order denying defendant's motion for a new trial and in arrest of judgment.
8. Bill of exceptions.
9. Order allowing bill of exceptions.
10. Petition for appeal and supersedeas.
11. Assignment of errors.
12. Order allowing appeal.
13. Undertaking on appeal.
14. Citation on appeal.
15. Copy of this praecipe as served upon counsel.

Very respectfully yours,

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER and McCULLOCH,
Attorneys for Defendant and Appellant, Spokane, Portland and Seattle Railway Company. [52]

State of Oregon,
County of Multnomah,—ss.

Due service of the within praecipe for transcript is hereby accepted in Multnomah County, Oregon, this 3d day of August, 1931, by receiving a copy thereof, duly certified to as such by ————, of attorneys for ————.

DAVIS & HARRIS,
Attorneys for Plaintiff.

Filed August 3, 1931. [53]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 3 to 53, inclusive, constitute the transcript of record upon the appeal in a cause in said court, No 10,827, in which Charles A. Cole is plaintiff and appellee, and Spokane, Portland and Seattle Railway Company is defendant and appellant; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $7.75 and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 22d day of August, 1931.

[Seal] G. H. MARSH,
Clerk. [54]

[Endorsed]: No. 6590. United States Circuit Court of Appeals for the Ninth Circuit. Spokane, Portland and Seattle Railway Company, a Corporation, Appellant, vs. Charles A. Cole, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed August 24, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.